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Subject: Microsoft Settlement

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As a professional software engineer and the owner of a small software firm, I have taken a keen interest in Microsoft's development of a personal computer operating system monopoly, and in the subsequent filing and progress of the United States v. Microsoft case. I am pleased that the court has correctly identified Microsoft's pattern of illegal monopolistic behavior; however, I am concerned that the proposed settlement, while carefully written, will fail to make any substantial impact on Microsoft's future conduct.

Background

As mentioned in the documents associated with the case, the District Court found, and the Court of Appeals affirmed, that Microsoft unlawfully protected and maintained its operating system monopoly in violation of antitrust laws. In the United States' Competitive Impact Statement, two examples are cited of this type of behavior. One example is the elimination of Netscape Navigator as a viable cross platform competitor to Microsoft's own Internet Explorer, thus increasing the barriers to new competitors' entering the operating system market. The other example is Microsoft's partially successful efforts to squelch Sun Microsystems' Java language, thus ensuring that third party applications developers will have a large incentive to develop first - or only - for Microsoft's dominant Windows operating system.

It should be noted that Microsoft engaged in this type of behavior even where it was clearly monopolistic and anticompetitive: the example given is that of threatening Apple with the termination of Microsoft Office for Macintosh, not for any business reason related to the Office product, but instead to force Apple to make the unrelated Internet Explorer product the default Macintosh browser. Microsoft has yet to admit that this and similar examples of obviously unethical and illegal behavior were wrong; indeed, they continue to act in accordance with their own peculiar interpretation of 'innovation', ignoring others' standards of ethics or law. These examples are typical of Microsoft's behavior.

The Proposed Final Judgement

The Proposed Final Judgement seeks to remedy Microsoft's unlawful conduct by prohibiting certain forms of behavior - behavior that Microsoft has used in the past to illegally leverage and maintain the Windows operating system monopoly. In particular, Microsoft would be required to use common Windows licensing terms for the 20 largest original equipment resellers of Microsoft products, would be prohibited from retaliating against them, and would be required to make applications programming interfaces (APIs) available to third party software developers.

Unfortunately, these remedies would be unlikely to have a significant practical effect on Microsoft's conduct.

Microsoft's past behavior and present statements indicate that they do not view anything that they have done as wrong, either ethically or legally. In light of this, they are likely to simply continue their present behavior into the future, ignoring any settlement terms just as they have in the past ignored antitrust law as a whole. The plaintiffs will thus have the burden of taking Microsoft to court for each individual violation of the settlement terms. In practice, the vast majority of such violations will likely be simply ignored; third party vendors have development schedules are often measured in days or weeks, and would rarely be able to afford the months or years required to resolve disputes by appealing to the various proposed committees or the plaintiffs. The result would be little if any change in Microsoft's anticompetitive behavior.

In addition, Microsoft can easily circumvent specific terms. For example, the proposed terms would restrict Microsoft's licensing with respect to their 20 largest original equipment resellers. While these 20 largest resellers currently constitute a substantial portion of Microsoft sales, Microsoft could restructure their product licenses - for example by licensing on a state by state basis - so as to increase the nominal number of resellers, and thus limit the applicability of the proposed terms to a small fraction of

their customer base. Microsoft could play similar games with respect to many other portions of the proposed terms, and indeed with any specifically defined behavioral remedies.

Microsoft has also shown a great ability to invent innovative new forms of anticompetitive behavior. However, because the proposed settlement terms are so narrowly defined, they will do nothing to prevent new forms of anticompetitive behavior on the part of Microsoft. Given that Microsoft has not admitted to any wrongdoing in previous behavior that was found to be illegal, they are likely to continue to violate the antitrust laws in new and different ways in the future.

Finally, and most importantly from my standpoint as a third party software developer, the technical aspects of the proposed remedies are simply unworkable.

The proposed terms seek to allow third party developers to compete with Microsoft's in house efforts by requiring Microsoft to publish documentation for its APIs. The argument is that such documentation would have, for example, permitted Netscape to compete on an equal basis against Microsoft's own Internet Explorer.

Unfortunately, publishing accurate and complete API documentation at early development stages, as envisioned in the proposed settlement, is not realistic; at those stages, the software itself is being constantly modified and updated, such that any published documentation becomes obsolete nearly instantly.

For one example, I was at one point involved in a project that used certain Microsoft Windows network APIs. We had one particular problem that we could not resolve even after days of effort; eventually we resorted to paying for phone support from Microsoft on the issue. It turned out that one of the API calls we were using had actually been omitted from Microsoft's product because of delivery deadlines, resulting in an unexplainable crash; we had to use a workaround.

This is typical of the problems faced by third party developers when competing with Microsoft in house efforts. Issues that can be resolved with a single email exchange or two minute phone call between Microsoft employees involve, for those who work in other companies, many unanswered emails, hours of hold time on the phone, and the requirement to authorize unexpected expenditures. This is true even in the presence of published API documentation. The advantages of personal contact and responsiveness at a working level within a company simply cannot be legislated in written settlement terms.

Breaking Up Microsoft

As discussed above, the terms of the Proposed Final Judgement would not prevent Microsoft from continued illegal use of its monopoly power; given Microsoft's refusal to wholeheartedly admit to previous wrongdoing, the best that could be hoped for would be minor changes in a few specific cases, and most of those only after additional litigation. The proposed terms' efforts to legislate a level playing field through the publication of APIs is likewise doomed to failure, since informal communications within the Microsoft organization will always be much quicker than formal and time consuming communications with those outside the organization.

The only solution is to reorganize Microsoft into separate entities, ensuring that it is in the interests of these new entities to behave in ways that are not illegally monopolistic. One way to do this would be to break Microsoft up into two parts. One part would be a Windows operating system company, the other a separate Microsoft applications company which would own both independently marketed applications software such as Office, as well as separately distributed free software such as Internet Explorer. The applications company would then have an incentive to develop for all operating systems, not just Windows, and the Windows operating system company

would no longer have any reason to give special treatment to Microsoft applications developers over third party developers.

This solution would benefit both the public and Microsoft's own stockholders.

Benefits to the Public

At present, much of Microsoft's efforts on behalf of its Windows operating system are centered on maintaining the Windows monopoly. This limits the amount of effort that could otherwise be spent on actually improving features or reliability, or on lowering prices.

This can be demonstrated by the fact that the only major personal computer manufacturer which does not use the Windows operating system - Apple Computer - has consistently higher margins than any of the manufacturers that do use Windows. Since all these manufacturers, including Apple, use the same component suppliers, the difference in margins cannot be attributed to hardware component cost or quality; instead, it is largely the result of software differences. Either Apple is able to charge a higher price by providing an operating system superior to Windows, or it is able to keep its per unit operating system development costs below the amount competing manufacturers pay for their copies of Windows.

If the Windows operating system were provided by a separate company, this new company could no longer leverage Microsoft's other assets - such as Office or Internet Explorer - to preserve its monopoly. Instead, it would have to refocus its efforts on improving the Windows operating system. These improvements might take the form of better features or reliability in the operating system itself, or of better and more accurately documented APIs that would make it cheaper to develop higher quality third party software, or simply of price reductions for the Windows product that would be passed along to the consumer. In any case, consumers would see a substantial benefit.

Benefits to Microsoft Stockholders

After a breakup, Microsoft stockholders would own stock both in the Windows operating system company and in the Microsoft applications software company. While the resultant changes in the operating system company would primarily benefit the public, Windows would still have substantial economies of scale that would benefit stockholders no less than they do today. In addition, freed of the need to artificially support the Windows monopoly, a separate Microsoft software company could expect to substantially improve its performance and value.

At present, the efficiency of Microsoft's applications development is handicapped in both obvious and subtle ways by the necessity of preferentially supporting the Windows operating system. One of the more obvious examples is having the continuance of a Macintosh version of Microsoft Office used as a political tool, rather than being based solely on sound business considerations. More subtle are the requirements to preferentially support the Windows infrastructure, eschewing alternatives - such as perhaps the Java language - simply out of loyalty to the corporation.

Similar inefficiencies are typical of other large monopolies. For example, the breakup of AT&T into separate regional bell operating companies and a long distance company resulted in substantially improved efficiency and growth - such that the total value of the separate companies today is many times that of AT&T when it was a monolithic monopoly prior to breakup.

A separate Microsoft applications development company would no longer be bound to support the Windows operating system except where that would be efficient. Applications could be developed using the most effective tools, regardless of source. The result would be higher product quality, lower development costs, improved market share and market growth, and, ultimately, higher value to stockholders.

Conclusion

United States v. Microsoft has correctly identified Microsoft's past pattern of illegally supporting and exploiting its Windows Operating system monopoly.

In addition, simply having both Windows operating system development and Microsoft applications software development under a common organization results in inefficient use of unrelated efforts to bolster the Windows monopoly. Breaking Microsoft up into a Windows operating system company and a separate Microsoft software company would enable both companies to operate more efficiently, benefiting both the public and Microsoft's own stockholders.

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